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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM ALMIEIRO,

Defendant and Appellant.

D053104

(Super. Ct. No. SCD207563)

APPEAL from a judgment of the Superior Court of San Diego County, Michael D. Wellington, Judge. Affirmed as modified.

After a mistrial and before a second trial, Adam Almieiro<sup>1</sup> admitted he had previously been convicted of a federal bank robbery that qualified as a prior serious felony conviction (Pen. Code,<sup>2</sup> § 667, subd. (a)(1)), a violent prison prior conviction (§ 667.5, subd. (a)), and also a strike under the Three Strikes Law (§§ 667, subd. (b)-(i),

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<sup>1</sup> The record reflects that Almieiro was also referred to as Almiero in the proceedings below.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise specified.

1170.12). A jury subsequently convicted Almieiro of two counts of robbery (§ 211) and found true allegations that he personally used a firearm in the commission of each crime (§ 12022.53, subd. (b)). After denying motions for a new trial and to dismiss the strike prior, the trial court sentenced Almieiro as a second striker to prison for a total term of 26 years and four months.

Almieiro appeals, contending the evidence was insufficient to support the jury's findings that he personally used a "real" firearm during the robberies, and therefore, the trial court had erred when it denied his motions for an acquittal at the close of the prosecution case and for a new trial based on the insufficiency of the firearm allegations. He also claims the court prejudicially erred in answering the jury's question regarding the firearm allegations, which essentially lessened the prosecution's burden of proof and directed its finding. Finally, Almieiro asserts several sentencing errors, claiming the court abused its discretion in denying his motion to dismiss his strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, which resulted in a sentence that is disproportionate to his offenses and constitutes cruel and unusual punishment, in imposing both firearm enhancements, and in imposing consecutive terms. With regard to this latter issue, Almieiro argues his trial counsel's failure to specifically object to the court's imposition of consecutive terms does not preclude review, but if such issue is considered waived, he was denied the effective assistance of counsel.

We affirm as modified to strike rather than stay Almieiro's prison prior enhancement and to correct the abstract of judgment to reflect he was sentenced under the two strike provisions of the Three Strikes law.<sup>3</sup>

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 29, 2007 at approximately 2:00 p.m., a man with a gun who was wearing a long sleeved shirt with blue stripes and large brown sunglasses with some gold in the middle robbed two bank tellers, Sarah Gawalis and Tianna Nguyen, at the Bank of America branch on Mira Mesa Boulevard in San Diego, California. San Diego Police Detective Robert Sylvester, who responded to the bank along with agents from the Federal Bureau of Investigation (FBI), interviewed Gawalis as well as downloading and reviewing the surveillance video from the bank's security camera. Photo boards were made from the surveillance video of the man robbing the bank and shown on television that night.

Based on a tip from a concerned citizen, Almieiro was identified as a possible suspect in the robberies. Sylvester, working with FBI Special Agent McNamara, then put

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<sup>3</sup> In sentencing, the court stayed Almieiro's three-year violent felony prison prior enhancement under section 667.5, subdivision (a) rather than striking it. Because such prior should have been stricken rather than stayed (see *People v. Jones* (1993) 5 Cal.4th 1142, 1153; *People v. Jones* (1992) 8 Cal.App.4th 756, 758), the court imposed an unauthorized sentence, which is subject to correction on review (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1295). We therefore order Almieiro's prison prior enhancement stricken and the abstract of judgment modified accordingly. (§ 1260.)

Additionally, the court is directed to check the box on the amended abstract of judgment to reflect that Almieiro was sentenced under the two strike provisions of the Three Strikes law, which was incorrectly left blank on the original abstract of judgment. (See, e.g., *In re Candelario* (1970) 3 Cal.3d 702, 705.)

together a six-pack photographic lineup, which included Almieiro's photo. McNamara took it to the bank and showed it to Nguyen the morning after the robbery. Nguyen identified Almieiro's photo as depicting the person who had robbed her with a gun at the bank the day before. With this information, and additional information from the concerned citizen that Almieiro would be at the Pacific Honda dealership in Kearny Mesa that afternoon, Sylvester, along with other officers from the San Diego Police Department and the FBI, waited at the dealership until they identified Almieiro leaving the dealership in his car with his girlfriend and arrested them.

During a search of Almieiro's car, police found, among other things, a pair of large brown sunglasses with gold and a long sleeved shirt with vertical stripes, similar to those described as being worn by the bank robber. Although no currency or gun was found in the car, Sylvester found \$2,101, mostly in \$100 dollar bills, in a search of Almieiro's person. Other officers recovered \$2,000, all in \$100 bills, from the car dealership, which was the money Almieiro had used to make a payment on his car. Neither a gun or any related firearm material like ammunition was found in the searches of Almieiro's person, his car or his residence.

After being transported to the police station, Almieiro and his girlfriend were left alone for a few minutes in the police car, where unbeknownst to them, their conversation was tape recorded. During such, Almieiro told his girlfriend to tell the police that he had been with her the previous day until 2:00 p.m. when he left to pick his sister up from school. In their later separate interviews with Sylvester, both Almieiro and his girlfriend stated they were together at the beach the day of the robbery until 2:00 p.m. when

Almieiro left to pick up his sister. Several days later Almieiro's girlfriend told another agent a different story regarding her activities on the day of the robbery.

Almieiro was charged with the current bank robberies and proceeded to jury trial, which resulted in a mistrial when the jury could not reach a verdict. Before the second jury trial, he admitted having suffered various prior conviction allegations as earlier noted. In addition to the above evidence being presented in the prosecution case, both bank tellers, Sylvester and another officer, who had participated in the arrest and search at the Honda dealership, testified.

Gawalis recounted that the man who had robbed her on June 29, 2007, walked into the bank at around 2:00 p.m., wearing a long sleeved white shirt with blue stripes and large brown sunglasses with some gold. He stood in line with other customers until she opened her window and called him to come forward. At that time, there were about 15 customers and 15 employees in the bank. When the man approached her window, he asked her to cash a check for him, but then backed up a couple of steps, pulled out a gun, announced that he was robbing the bank and yelled for everyone to get down on the floor. Gawalis did so, along with everyone else in the bank, as the man waved the gun around.

When the man then yelled "Teller Number One. Get up and give me your hundreds and your 50s," Gawalis stood up, grabbed the designated money from her cash drawer, which totaled about \$2,400, mostly in \$100 bills, placed the money on the counter in front of her, got back down on the floor and activated her silent alarm button. As she did so, Gawalis saw the man, who was still holding the gun, take the money from the counter with his other hand. Although she had "bait money" in \$20 bills in her cash

drawer, she did not give it to the man because he specifically demanded \$100 and \$50 bills, and she feared he might use the gun if she did so. After the man grabbed the money from her counter, he went over to the next teller and demanded she also give him her \$100 and \$50 bills.

Gawalis testified she had been frightened during this incident, both for her safety and for the safety of others at the bank, and had been unable to work the next day because she was still scared and upset about the robbery. Although Gawalis was thus not shown the photographic lineup, which included Almieiro's photo, she positively identified him at trial as the man who had robbed her. She also identified still photographs made from the bank's video surveillance camera, which showed the robber with a gun in his hand, including one which showed him pointing the gun at the other teller Nguyen, and identified both the shirt and the sunglasses later recovered from Almieiro's car as resembling those worn by the robber.

Gawalis described the gun the robber had used as "little and it was silver." She admitted that she did not know much about guns and said she was unable to tell whether it was "a real gun or a replica gun."

Nguyen then testified that at around 2:00 p.m. on June 29, 2007, she heard a customer who Gawalis was assisting yell, "This is a bank robbery. Everybody get down." As Nguyen looked over, she saw the man "pulling a gun," so she got down on the floor with everyone else. Nguyen had noticed the man earlier in line because he was wearing a long sleeved shirt with the sunglasses on a hot day and he was looking around a lot as he stood in line. She then heard the man demand money from Gawalis and heard

her open her money drawer. When the man then said, "Teller number 2, open your drawer and give me your [100s and] 50s," Nguyen stood up enough to open her drawer and put her 50s and 100s on the counter. She estimated she gave the robber \$2,000 to \$3,000 in \$100 and \$50 bills, which she saw him grab from her counter. Like the other teller, Nguyen did not give the man any "bait money" because she feared it might "trigger something" if she did so as he only had asked for \$50s and \$100s and had a gun. She also thought he had probably robbed banks before because he had specifically asked for those denominations, while bait money was always in \$20 bills, which was information not usually shared with the public. The man left the bank with the money without firing a shot.

Although frightened during the robbery, Nguyen returned to work the next day where she was again interviewed by FBI agents and shown the six-pack lineup which contained Almieiro's photo. She positively identified his photo as the man who robbed her. Nguyen, like Gawalis, also positively identified Almieiro in court as the robber and identified the sunglasses and shirt retrieved from his car as looking like the ones the robber wore.

With regard to questioning about the gun held by the robber, Nguyen said she knew it was not a revolver because it did not have a cylinder, that it was "kind of dark," but she could not tell its color. Although she did not have a lot of familiarity with guns, she knew "[j]ust a little." She explained that she knew the gun was either an automatic or semiautomatic as it was the type where the bullets go into the gun handle and "you have

to pull it to shoot." Nguyen, however, could not say whether the gun Almieiro had held and waved at everyone in the bank was real or was a replica or toy.

When Sylvester testified at trial, he noted that one of the still photos taken from the bank's surveillance video showed the robber with a "combat grip" on the gun. He opined that Almieiro was the man in the surveillance photos.

### *Defense Case*

Almieiro generally presented a mistaken identity and alibi defense through his own testimony and that of his stepmother, sister and a neighbor to show that he was elsewhere at 2:00 p.m. on June 29, 2007 when the bank tellers were robbed. Specifically, Almieiro claimed that on the day of the robberies, he had picked his stepmother up at her office in La Jolla and had taken her to a nearby dental office for dental surgery at 12:30 p.m. before returning home to eat, clean and talk with a neighbor. He then picked up his sister from school between 2:10 and 2:30 p.m., picked up his stepmother from surgery at 2:45 p.m. and took her back to work, and then drove to a beach in Del Mar where he and his sister met up with his then girlfriend. He denied he had robbed a bank and testified that the shirt and sunglasses found in his car during the search had belonged to his ex-girlfriend. The testimony of Almieiro's stepmother, sister and neighbor essentially confirmed the times and events he had related as to his whereabouts near the time of the robbery.

Almieiro further testified that on the morning he was arrested, his father had given him \$3,400 in \$100 bills for him to make a payment on his car because he was having trouble financing it. He claimed that the dealership accepted \$2,000 of that money to



allow him to keep possession of the car and that the remaining money found on his person when he was arrested came partially from his father and also from selling "weed." Almieiro presented the testimony of his father to corroborate that most of the money found on his person and given to the car dealership was not from the bank. His stepmother also confirmed that his father had given him about \$3,400 in cash to make a payment on his car. On cross-examination, Almieiro's father conceded he had not told any law enforcement officers investigating the robberies or anyone before trial that he had given Almieiro any money.

In his testimony, Almieiro admitted he had initially given the police a different story about how he spent his time on the day of the robbery and also that he had asked his ex-girlfriend to lie for him about being with her at the beach until 2:00 p.m. that day, explaining he did so because he wanted it to be over "quick." Almieiro further conceded he had told his ex-girlfriend that if he made bail, he was going to leave the country. He additionally noted he had previously been convicted of a related federal felony and had been out of prison and on parole since February 22, 2007. Almieiro, as well as his father, conceded that the robber in the bank's surveillance photos looked similar to Almieiro.

## DISCUSSION

### I

#### *SUFFICIENT EVIDENCE TO SUPPORT FIREARM FINDINGS*

Almieiro contends the evidence was insufficient to support the jury's finding that he personally used a firearm in the commission of the two counts of robbery within the meaning of section 12022.53, subdivision (b). He specifically contends that there was

insufficient evidence that the object he brandished at the bank was a "real" firearm capable of discharging a projectile through the barrel "by the force of an explosion or other form of combustion" rather than a toy or replica gun because each teller testified she did not know for sure whether it was real and because neither the purported firearm or any item related to a firearm was ever recovered. Almieiro thus claims the trial court erred when it denied his motions for an acquittal and for a new trial on such ground of insufficient evidence to support the firearm enhancement findings. We disagree.

In reviewing a challenge to the sufficiency of evidence, we " 'consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment [or finding]. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citation.] We consider whether a rational trier of fact could have found the essential elements of the crime [or allegation] beyond a reasonable doubt. [Citations.]" (*People v. Romero* (2006) 140 Cal.App.4th 15, 18 (*Romero*)). This same standard applies when a conviction or finding rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

In addition, the standard applied by a trial court in ruling upon a defendant's motion for judgment of acquittal under section 1118.1 is the same as our standard in reviewing the sufficiency of the evidence to support a conviction or enhancement finding. (*People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656.)

With regard to a new trial motion, "[a] trial court may grant a motion for new trial only if the defendant demonstrates reversible error. [Citation.]" (*People v. Guerra*

(2006) 37 Cal.4th 1067, 1159.) "On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion. [Citation.] Its ruling will not be disturbed on appeal ' "unless a manifest and unmistakable abuse of discretion clearly appears." [Citation.]' [Citation.]" (*Id.* at pp. 1159-1160.)

As relevant to Almieiro's various sufficiency of evidence arguments, in order to establish the firearm enhancement under section 12022.53, subdivision (b), the prosecution was required to prove beyond a reasonable doubt that "the defendant personally used a firearm during the commission of [each robbery]." In order to do so, CALCRIM No. 3146 told the jury that,

"A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting. A firearm does not need to be loaded. [¶] Someone personally uses a firearm if he or she intentionally does any of the following: [¶] 1. Displays the firearm in a menacing manner; [¶] 2. Hits someone with the firearm; [¶] OR [¶] 3. Fires the firearm."

Whether an object used by a robber was a "firearm" can be shown either by direct or circumstantial evidence. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11-12; *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).) "Circumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm. [Citation.]" (*Id.* at p. 1436.) Not only may a defendant's own words and conduct in the course of a robbery support a rational fact finder's determination that he used a firearm, but jurors "may draw an inference from the circumstances surrounding the robbery that the gun was not a toy." (*People v. Aranda* (1965) 63 Cal.2d 518, 533; see *Rodriguez*,

*supra*, 20 Cal.4th at p. 13.) In other words, where "a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b)." (*Monjaras, supra*, 164 Cal.App.4th at p. 1437.)

Here, after Almieiro entered the bank, he pulled out a gun and waved it at the customers and tellers while announcing a robbery and ordering everyone to get on the ground. Once everyone complied, he commanded several tellers to give him money while he still held the gun. Both tellers who were robbed testified they were scared for themselves and the others in the bank and gave Almieiro the money in the denominations he demanded rather than "bait money" because they feared he might use the gun he was holding and waving around. One teller identified Almieiro in a still photo taken from the bank's surveillance video holding the gun and pointing it at the other teller who was robbed and the investigating detective identified the photo as showing that Almieiro held the gun with a "combat grip."

Although one teller had no familiarity with guns and the other only a little familiarity, enough to know that the gun was not a revolver but appeared to be either a semiautomatic or an automatic, and they conceded they could not say for certain whether the gun was real or a replica or toy, "[t]he jury was not required to give defendant the benefit of the victim[s'] inability to say conclusively the pistol was a real firearm." (*Monjaras, supra*, 164 Cal.App.4th at p. 1436.) Even though "it is conceivable that the [gun] was a toy, the jury was entitled to . . . infer from [the defendant's] conduct that the

[gun] was a real, loaded firearm and that he was prepared to shoot the victim[s and the other people in the bank] with it if [they] did not comply with his demand[s]. [Citation.]" (*Id.* at p. 1437.) Therefore, based on the totality of the evidence, which included the witnesses' testimony, the surveillance photos, and Almieiro's own actions during the robberies, the jury could have reasonably inferred that the gun used by Almieiro was a real firearm.

Contrary to Almieiro's reliance on various cases that contained more direct evidence of personal use of a firearm to support the enhancement findings than in this case, the court in *Monjaras*, *supra*, 164 Cal.App.4th 1432, rejected a claim similar to Almieiro's that without a weapon being recovered or fired or a victim being able to say for certain whether the weapon was real there is not sufficient evidence to support a firearm finding. (*Id.* at pp. 1435-1438.) We agree with the reasoning and holding in *Monjaras* that "the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm. [Citation.]" (*Id.* at pp. 1437-1438.) We thus conclude there was sufficient evidence to support the jury's findings that Almieiro personally used a firearm during each of the charged robberies.

Consequently, because the same evidence that we have reviewed was presented in the prosecution case, the trial court also had sufficient evidence before it to properly deny Almieiro's motion for judgment of acquittal brought on the same grounds and arguments. Further, regarding the new trial motion also brought on the identical grounds and arguments, Almieiro has simply not shown that the court's denial was " 'outside the

bounds of reason' under the applicable law and relevant facts [citations]."<sup>4</sup> (*People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*).) Accordingly, on this record the trial court did not err in denying either motion.

## II

### *CLAIMED IMPROPER ANSWER TO JURY QUESTION*

At the close of evidence, the court instructed the jury with, among other instructions, CALCRIM No. 3146, on the elements for finding that Almieiro personally used a firearm, and CALCRIM No. 220, on reasonable doubt. During deliberations, the jury sent a note to the trial court asking, "If we all believe it is a real firearm based on the photos and testimony, is this sufficient to find that the defend[a]nt did use, beyond a reasonable doubt, a firearm[?]" In response, the court prepared an answer which would tell the jury:

"Ladies and Gentlemen: As with all the factual questions in this case it is up to you, the jurors, to decide whether you are convinced beyond a reasonable doubt. You have been give[n] the legal definition of 'beyond a reasonable doubt.' If, based on the evidence, you are convinced beyond a reasonable doubt that the robber used a real firearm, that is sufficient for you to find that it was a firearm."

The court's clerk then contacted both counsel by telephone and read them the note and the court's proposed response. The court minutes reflect that both "counsel agree[d] to have the response sent into the deliberation room." Shortly after the response was

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<sup>4</sup> We decline to address Almieiro's assertion raised for the first time in his reply brief that the standard the trial court used in determining the new trial motion was incorrect.

given to the jury in the deliberation room, they notified the clerk that they had reached a verdict.

Almieiro contends the trial court's response to the jury's question impermissibly directed the jury to find the firearm allegations to be true and lessened the prosecution's burden of proof thereby denying him due process. We conclude no due process violation occurred.

Preliminarily, we note that Almieiro has waived the issue by failing to object and by agreeing to the court's response to the jury's question. (*People v. Turner* (2004) 34 Cal.4th 406, 437.)

In any event, Almieiro's claim fails on the merits. Although a trial court has a statutory duty to provide the jurors with information they desire on points of law and must attempt to clear up any instructional confusion they may express concerning the legal principles they are asked to apply (§ 1138; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465), the court has broad discretion to determine what additional explanations are sufficient to satisfy the jurors' request for information where the original instructions are themselves full and complete. (*People v. Smithey* (1999) 20 Cal.4th 936, 985; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1015.) To establish a due process violation regarding such matter, the defendant must show a reasonable likelihood that the jury has applied the trial court's answer in a way that violates the Constitution. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

Here, the original instructions given the jury were correct and complete and instructed the jury as to what the prosecution needed to show for the jurors to find that

Almieiro personally used a firearm during the robberies and as to their burden of proof. Even though these instructions were adequate, the court in its discretion attempted to clear up the jury's confusion expressed in its note, and such attempt was verbally approved by both counsel before it was given to the jury. Through the response, the court dispelled any notion a mere general belief that the object in question was a real gun was sufficient to find that Almieiro had used a firearm within the meaning of the enhancement statute, stressing several times that it was the jury's duty to determine whether the prosecution had met its burden of proof, which was "beyond a reasonable doubt," and referring the jury back to the reasonable doubt instructions.

Contrary to Almieiro's assertion otherwise, the trial court was not required to also reinstruct the jury as to what constituted a "real gun." The jurors' note evidences that they were well aware of what constituted a real gun but were solely concerned with the appropriate burden of proof. Under these circumstances, the trial court properly and adequately responded to the jurors' question and there is no reasonable likelihood they construed the response in a manner that violates the Constitution. No error or due process violation is shown.

### III

#### *SENTENCING ISSUES*

At sentencing, after reading and considering the probation officer's report, the prosecution's sentencing memorandum, and Almieiro's statement in mitigation, in which he asked the court to dismiss his strike prior and to run his sentences on his two robbery counts concurrently, and hearing argument from counsel, the court asked whether there



was any disagreement with the proposition that if it chose to do so, separate firearm enhancements could be imposed for each of the two counts because of the two victims. In response, Almieiro's counsel said he did not disagree with the court's statement, noting "there's no rule that tells the court that [it] cannot impose separate enhancements in that way [and that it was] a situation where it would be a discretionary standard." The court noted it also had "discretion with regard to the two separate robbery counts since they arose at the same time out of the same operative facts." After hearing further argument from both counsel, the sentencing judge stated:

"Well, Mr. Almieiro's not eligible for probation so long as the strike is there and unless I strike the strike. I'm not going to strike the strike. Even without the strike, he would not be a candidate for probation, and the same reasons really argue against considering striking the strike. [¶] He's already got one bank robbery to his name. I think it was like four months he was out on parole when this one happened, and he ups the ante by bringing a gun to this one or at least displaying a gun at this one. So I will deny probation. I'll deny the request to strike the prior, and I will sentence Mr. Almieiro to state prison. [¶] On count 1, the robbery, I'm going to . . . I hear and understand [the prosecutor's] arguments for the upper term. I disagree. I think this is a mid-term case. I think the main thing that makes this crime serious is the fact that it's his second robbery and he's just four months out on parole. He's getting hit pretty good for the previous robbery in terms of the strike and the five-year prior. I think . . . that's the big thing that makes this serious. [¶] . . . It's also more serious because of the multiple victims. There are multiple, legally recognized victims. That's two counts. But I agree with [the prosecutor, t]here were a lot of victims in this bank. Everybody was scared to death. [¶] So he's . . . going to be getting extra punishment for the multiple victims. I'll get to that in a minute. So all told, I think the mid term is appropriate here. That's three years, doubled for the strike, for six years. The [section] 12022.53[, subd.] (b), the gun allegation, adds ten years consecutive to the six years. [¶] On count 2, I . . . have gone back and forth on this, but I think that consecutive sentences are appropriate for this because we've got two young ladies who were directly accosted, and so we've got separate

victims of a violent crime, and it's not the first time this guy has been involved in a violent crime like that. I think consecutive sentences are appropriate. [¶] So a third of the mid term, doubled for the strike, is two years. A third of the ten years for the gun use is three years, four months."

The court then imposed an additional five years for the serious felony prior and, after staying the term for the prison prior, noted the total prison term it was imposing was 26 years, four months. After imposing the various restitution amounts and fines, and awarding credits, the court inquired whether there was anything else to cover. Only the prosecutor responded, advising the court about the need to explain Almieiro's right to appeal.

On appeal, Almieiro raises several sentencing issues which we address in turn.

*A. Multiple Firearm Use Enhancements*

Almieiro first contends the trial court "erred in imposing multiple firearm use enhancement penalties for a single act," arguing there was only one bank robbery, one use of the gun, and only one intent to permanently deprive the bank of money. However, as the record reflects, Almieiro's counsel conceded below that the trial court was correctly interpreting the law, which permitted it to impose separate firearm use enhancements for each robbery count even though they arose out of a single act. Therefore, Almieiro has forfeited his claim to argue that the court could not properly impose such enhancements. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354 (*Scott*).)

Regardless, the claim has no merit because section 12022.53, subdivision (f) specifically provides that the additional punishment for the firearm use under that section shall be "imposed per person for each crime," and our Supreme Court in *People v.*

*Palacios* (2007) 41 Cal.4th 720, 727-728, held that section 654 does not apply to such enhancement provisions even if they arise out of a single act and are committed against a single victim. The trial court did not err in imposing a separate firearm enhancement under section 12022.53, subdivision (b) for each of Almieiro's robbery offenses.

### *B. Consecutive Sentences*

Almieiro next complains that the trial court erred when it imposed consecutive sentences for his two robbery convictions, arguing it impermissibly dual used his prior conviction to both enhance his sentence and as a reason for running his terms consecutive, and it failed to properly consider the mitigating factors. Almieiro recognizes that his counsel did not specifically object to such discretionary choice at the sentencing hearing, but asserts the failure to do so is excused because his counsel had presented his arguments for concurrent sentences in the statement of mitigation and had no additional meaningful opportunity to object after the court imposed the consecutive sentences and "abruptly" proceeded to address other sentencing matters. Alternatively, Almieiro claims he was denied the effective assistance of counsel should we consider the matter forfeited by the failure to object. We disagree with Almieiro's various arguments in this regard.

Because the imposition of consecutive terms was an authorized sentencing choice (§ 669), Almieiro's failure to object to their imposition on grounds that they were improperly based upon an "impermissible dual use of facts" or that the court did not properly consider and weigh the mitigating factors are forfeited on appeal. (*Scott, supra*, 9 Cal.4th at pp. 353-354.) Contrary to Almieiro's arguments that this forfeiture rule does not apply here, the record reflects that his statement in mitigation did not specifically

mention any impermissible dual use of facts and he did have a meaningful opportunity near the end of the sentencing hearing to object to any such dual use or to ask the court about its alleged failure to consider the appropriate mitigating factors he now urges as error on appeal, but did not do so. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) Under these circumstances, the waiver doctrine enunciated in *Scott* precludes appellate review of the consecutive versus concurrent discretionary determination made with regard to Almieiro's two robbery counts.

As to Almieiro's alternative claim that he was denied the ineffective assistance of counsel due to his trial counsel not making appropriate objections to prevent forfeiture of the issues on appeal, such also fails. Even assuming the court improperly dual used the fact of his prior bank robbery conviction, and his counsel was deficient for failing to object to such improper dual use, Almieiro cannot show any prejudice as a result of that omission in this case. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.) Had his counsel objected on such ground, it is not reasonably probable he would have received concurrent sentences rather than consecutive terms because there was a valid basis for imposing the terms based on his separately singling out two victims and taking money from each at gunpoint (see Cal. Rules of Court, rule 4.425(b)), regardless of the fact the two takings occurred during a single episode, a reason the trial court clearly stressed at sentencing. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

In addition, because a court is not required to state reasons for rejecting the factors that Almieiro claimed were mitigating (*People v. Downey* (2000) 82 Cal.App.4th 899, 919) and the record shows the trial court had read and considered Almieiro's statements

in mitigation as well as the probation report, which also contained mitigating factors, a reasonable attorney would not assume that the court had failed to consider such factors before making its sentencing decisions as Almieiro now does on appeal. Almieiro simply cannot show on this record that he was prejudiced by any purported omission by his trial counsel in this regard.

*C. Motion to Dismiss the Strike Prior*

As part of his statement in mitigation, Almieiro made a motion under section 1385 to dismiss his prior strike, asserting he was already being punished with the five-year serious felony enhancement, nobody was injured during the robberies, most of the stolen money was recovered, he did not carry out the crimes in a sophisticated manner, he was 23 years old, young and impulsive and not a hardened criminal, and he had a supportive family. The prosecutor's sentencing memorandum argued against dismissing the prior strike because Almieiro had shown he was unable to remain law abiding and there was nothing mitigating about his background or character that would warrant striking his prior bank robbery conviction. The trial court considered these positions as well as the probation report and further argument of counsel before denying the motion on grounds Almieiro had committed these instant bank robberies with the use of a gun only four months after being out on parole from another bank robbery. In doing so, it impliedly found that Almieiro should not be deemed outside the spirit of the Three Strikes law and that dismissing the prior strike conviction would not be in the "furtherance of justice."

Almieiro contends the trial court abused its discretion in failing to grant his *Romero* motion to dismiss his strike prior under section 1385 and that the resulting

sentence was disproportionate to his offenses and violated the constitutional guarantees against cruel and/or unusual punishment. He specifically argues that the court erred in denying his motion because it relied on only three aggravating factors and did not "consider any of the mitigating factors that favored dismissing the finding of a prior strike." Almieiro has failed to show that the court abused its sentencing discretion or that his resulting sentence was cruel and/or unusual.

We review a trial court's decision not to strike a prior conviction under section 1385 under the "deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*); see also *Romero, supra*, 13 Cal.4th at pp. 530-531.) Under this standard, we do not reweigh the sentencing factors or substitute our evaluation for that of the trial court. A " ' "decision will not be reversed merely because reasonable people might disagree" ' "; rather, "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances [,such as] where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible facts in declining to dismiss [citation], [or where] 'the sentencing norms [established by the Three Strikes Law may, as a matter of law,] produce an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

A trial court must also " 'consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as

though he had not been previously convicted of one or more serious and/or violent felonies' [citation]" before exercising its discretion to strike a prior felony conviction. (*Carmony, supra*, 33 Cal.4th at p. 377; *Williams, supra*, 17 Cal.4th at p. 161.)

The burden is on the party attacking the trial court's decision not to dismiss the prior strike conviction to clearly show that the decision was irrational or arbitrary and absent such showing, it is presumed the court acted to achieve a legitimate sentencing objective. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Almieiro has not met that burden.

Almieiro has failed to point out anything in the record that shows the court was unaware of its discretion to dismiss a strike, that it declined to exercise its discretion based on a clearly improper reason or, as noted above, that it did not properly consider the mitigating factors. "Absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty to consider all possible mitigating and aggravating factors in determining the appropriate sentence." (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888.) It is not our role to reweigh the sentencing factors or substitute our evaluation for that of the trial judge who in this case clearly expressed the view that Almieiro's short but increasingly violent criminal history did not justify the exercise of his discretion to strike the prior. The court's exercise of its discretion is amply supported by the record.

Almieiro has not shown that the court considered any impermissible factors in denying his *Romero* motion or that he warrants departure from the legislatively preferred three strikes sentencing scheme. Because he has made no effort to change his criminal

behavior after getting out of prison for his federal bank robbery, Almieiro is the type of recidivist who falls wholly within the "spirit" of the Three Strikes law. (*Williams, supra*, 17 Cal.4th at pp. 162-163.) Under these circumstances, we cannot find that the court abused its broad sentencing discretion in this matter. (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

Nor can we conclude on this record that the resulting sentence under the Three Strikes law was disproportionate to Almieiro's offenses or constituted cruel and/or unusual punishment as he summarily contends. Because he has not provided any argument for his disproportionality or cruel and unusual punishment claims, we decline to elaborate on these issues other than to note that given all the relevant considerations, the fact Almieiro will serve 26 years, four months as a recidivist offender convicted of two armed bank robberies simply does not shock the conscience or offend concepts of human dignity. (See *Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63; *Harmelin v. Michigan* (1991) 501 U.S. 957; *In re Lynch* (1972) 8 Cal.3d 410; *In re DeBeque* (1989) 212 Cal.App.3d 241, 249.) We thus conclude Almieiro has failed to establish his sentence is so disproportionate to his crimes, which include his recidivist behavior, and that the total sentence imposed for them does not violate the constitutional prohibitions against cruel and unusual punishment.

#### DISPOSITION

Almieiro's prison prior enhancement is stricken rather than stayed. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and to also correct the abstract of



judgment as noted in this opinion. The court is to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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McDONALD, J.